Hoo Ah Tee v Public Prosecutor

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–17–01 OF 2010

B

APANDI ALI, LINTON ALBERT AND HAMID SULTAN JJCA
20 MAY 2013

C

Criminal Law — Murder — Defence — Automatism — Whether trial judge considered accused's defence of automatism or attack of hypoglycemia or neuroglycopenia — Whether defence bore merit

D

Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused charged under s 300(a) of the Penal Code ('Code') — Judgment of trial judge reflected that accused found guilty of s 300(d) — Charge not amended at any material time to enable defences under ss 85 and 86 of the Code — Whether trial judge erred

E

The appellant was charged for murder, an offence under s 302 of the Penal Code ('Code'). The prosecution's case canvassed on testimonies of the main eyewitnesses, SP4 and SP8, who both saw the appellant attacking the deceased with a parang. SP4 who was in the hall of her house saw the deceased, her father in-law, returning home from jogging. However, before the deceased could open the gate, SP4 saw the appellant suddenly approaching the deceased and swung the parang and hit him. SP8, a security officer at a school nearby had witnessed the argument between the appellant and the deceased. According to SP8, the appellant approached the deceased first and started quarreling loudly in Chinese. Both SP4 and SP8 saw the appellant slashing the deceased's head. SP4 saw clearly the appellant slashing three times at the neck of the deceased after which the deceased fell on the road. The appellant then went into his house compound, washed his hands, rode his motorcycle and made a police report. The post mortem conducted on the deceased certified that the deceased died as a result of the injury to the neck. In the High Court, the trial judge went on to say that the prosecution relied on s 300(d) of the Code. However, it was the contention of the appellant that he was charged under s 300(a) and failure to amend the charge would deprive him valid defences under the law. At the end of the prosecution's case, the appellant was found guilty, convicted of the charge and sentenced to death. In the present appeal, the central contention of the appellant was that he was charged under s 300(a) of the Code but the judgment of the trial judge reflected that he was found guilty of s 300(d) and the charge was not amended at any material time to enable the defences under

F

G

H

I

A ss 85 and 86 of the Code. The other appeal was in relation to the defence relating to automatism.

Held, dismissing the appeal:

B (1) The appellant's submission on s 300 of the Code was misconceived and had no merits. The court did not see how the exception to murder as advocated in Exception 4 of s 300 the Code would apply in this case when there was clear evidence to attract a charge of murder. Furthermore, perusal of the appeal record in detail found no evidence to attract Exception 4 in the Illustrations of s 300 (see paras 12, 13 & 14).

C (2) The court found it difficult even to fathom how automatism of any kind would be applicable either to obtain an acquittal or reduction of charge and in consequence there could not in law be grounds for mitigation of punishment. After perusing the submission filed by the appellant and D contrasted with the evidence and law, the court found no merits (see para 20).

(3) The appellant's complaint that the defence of automatism or attack of hypoglycemia or neuroglycopenia was not appropriately considered also bore no merit. It was the finding of the trial judge that the defence of E unawareness or automatism by reason of hypoglycemia must fail. The Code or other relevant Act does not specifically provide for the defence of automatism or state its element, applicability or burden of proof (see paras 15 & 18).

F (4) Section 84 of the Code itself does not deal with the jurisprudence relating to automatism. Section 84 of the Code has everything to do with legal insanity and not medical insanity. Despite a number of cases in Malaysia where defence of automatism was placed and adumbrated by the courts, automatism per se was not an absolute defence to murder within the G court's jurisprudence save that it might assist to mitigate punishment if the defence was well-nurtured (see paras 18 & 19).

[Bahasa Malaysia summary

Perayu telah dituduh membunuh, satu kesalahan di bawah s 302 Kanun H Keseksaan ('Kanun'). Kes pendakwaan telah berdasarkan testimoni-testimoni saksi-saksi utama, SP4 dan SP8, yang mana kedua-duanya melihat perayu menyerang si mati dengan parang. SP4 yang berada di ruang depan rumahnya melihat si mati, bapa mertuanya, pulang ke rumah daripada bersenam. Walau bagaimanapun, sebelum si mati sempat membuka pagar, SP4 melihat perayu I tiba-tiba datang ke arah si mati dan menghayun parang dan melibasnya. SP8, seorang pegawai keselamaan di sekolah berdekatan telah menyaksikan pergaduhan antara perayu dan si mati. Menurut SP8, perayu datang ke arah si mati dahulu dan mula bertengkar dengan kuat dalam bahasa Cina. Kedua-dua SP4 dan SP8 melihat perayu melibas kepala si mati. SP4 melihat dengan jelas

perayu melibas sebanyak tiga kali di leher si mati di mana selepas itu si mati jatuh ke atas jalan. Perayu kemudian masuk ke kawasan rumahnya, membasuh tangannya, membawa motorsikalnya dan membuat laporan polis. Post mortem yang dilakukan ke atas si mati mengesahkan bahawa si mati meninggal dunia akibat kecederaan di leher. Di Mahkamah Tinggi, hakim perbicaraan mengatakan bahawa pendakwaan bergantung kepada 300(d) Kanun tersebut. Walau bagaimanapun, adalah hujah perayu bahawa dia telah dituduh di bawah s 300(a) dan kegagalan untuk meminda pertuduhan akan menafikannya pembelaan yang sah di bawah undang-undang. Di akhir kes pendakwaan, perayu didapati bersalah, disabitkan dengan pertuduhan tersebut dan dihukum mati. Dalam rayuan ini, hujah utama perayu adalah bahawa dia telah dituduh di bawah s 300(a) Kanun tersebut tetapi penghakiman hakim perbicaraan menggambarkan bahawa dia didapati bersalah kerana s 300(d) dan pertuduhan tersebut tidak dipinda pada mana-mana masa matan untuk membolehkan pembelaan-pembelaan di bawah ss 85 dan 86 Kanun tersebut. Rayuan lain adalah berkaitan pembelaan mengenai automatisme.

Diputuskan, menolak rayuan:

(1) Hujah perayu berhubung s 300 Kanun tersebut telah disalah tanggap dan tidak mempunyai merit. Mahkamah tidak dapat melihat bagaimana pengecualian untuk membunuh sebagaimana dinyatakan dalam Pengecualian 4 s 300 Kanun tersebut boleh terpakai dalam kes ini di mana terdapat keterangan yang jelas untuk membuktikan pertuduhan membunuh. Bahkan, penelitian rekod rayuan secara terperinci mendapati tiada keterangan untuk menggunakan pengecualian dalam Ilustrasi-Ilustrasi s 300 (lihat perenggan 12, 13 & 14).

(2) Mahkamah mendapati ia sukar untuk membayangkan bagaimana automatisme dalam apa jenis boleh terpakai untuk mendapatkan pelepasan atau pengurangan pertuduhan tersebut dan akibat itu tidak mungkin dari segi undang-undang terdapat alasan-alasan untuk mitigasi hukuman. Setelah meneliti penghujahan yang difailkan oleh perayu dan dibandingkan dengan keterangan dan undang-undang, mahkamah tidak mendapati apa-apa merit (lihat perenggan 20).

(3) Aduan perayu bahawa pembelaan automatisme atau serangan hypoglycaemia atau neuroglycopenia tidak diambil kira dengan wajar juga tidak mempunyai merit. Adalah penemuan hakim perbicaraan bahawa pembelaan ketidaksedaran atau automatisme disebabkan hypoglycaemia patut gagal. Kanun tersebut atau Akta lain yang relevan tidak secara khusus memperuntukkan pembelaan untuk auomatisme atau menyatakan elemen, pemakaian atau beban buktinya (lihat perenggan 15 & 18).

(4) Seksyen 84 Kanun tersebut dengan sendirinya tidak menyatakan apa-apa jurisprudens tentang automatisme. Seksyen 84 Kanun adalah mengenai

ketidakwarasan dari segi perundangan dan bukan ketidakwarasan dari segi perubatan. Meskipun sebilangan kes di Malaysia di mana pembelaan automatisme dikemukakan dan dibayangkan oleh mahkamah, automatisme per se bukan pembelaan mutlak untuk membunuh dalam jurisprudens mahkamah kecuali ia mungkin dapat membantu untuk meringankan hukuman jika pembelaan adalah kukuh (lihat perenggan 18 & 19).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 216–222.

For cases on defence, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1480–1508.

Cases referred to

Abdul Razak bin Dalek v Pendakwa Raya [2010] 3 AMR 610, CA (refd)
Cheong Kam Kuen v PP [2013] 1 MLJ 15; [2012] 8 CLJ 537, FC (refd)
Chin Kek Shen v PP Criminal Appeal No B-05–83/03 of 2012 (unreported) (refd)
PP v Mohd Aszzid Abdullah [2008] 1 MLJ 281, HC (refd)
PP v Thenegaran a/l Murugan [2013] 3 MLJ 328, CA (refd)
Rozmi bin Yusof v PP [2013] MLJU 366, CA (refd)
Surendra Mishra v State of Jharkhand (2011) 11 SCL 459 (refd)
Tong Kam Yew & Anor v PP [2013] MLJU 243, CA (refd)

Legislation referred to

Evidence Act 1950 ss 45, 105
Penal Code ss 84, 85, 86, 300, 300(a), (b), (c), (d), 302, 304

Appeal from: Suit No 45B–1 of 2011 (High Court, Shah Alam)

Stanley Augustine (Stanley Augustine & Co) for the appellant.
Aslinda Ahad (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant's/accused appeal came up for hearing on 12 March 2013 and upon hearing we dismissed it on the same day. My learned brother Mohamed Apandi bin Hj Ali JCA and Linton Albert JCA have read the judgment and approved it. This is our judgment.

[2] The central contention of the appellant relating to law is that the accused was charged under s 300(a) of the Penal Code but the judgment of the learned

trial judge reflects that he was found guilty of s 300(d) and the charge was not amended at any material time to enable the defences under ss 85–86 of the Penal Code. The other is the defence relating to automatism.

[3] The amended petition of appeal, inter alia, reads as follows:

(a) Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila Yang Arif telah menyatakan bahawa pendakwaan telah buktikan tuduhan yang dihadapi oleh perayu di bawah Seksyen 300 keempat (Seksyen 300 (d)) manakala tuduhan yang dihadapan oleh tertuduh di bawah Seksyen 300 pertama Kanun Keseksaan (Seksyen 300 (a)). Oleh yang demikian, Yang Arif bergantung kepada Seksyen 300 keempat dan Yang Arif telah gagal untuk memberi pertimbangan dan merujuk kepada pembelaan di bawah Seksyen 85(2)(b) dan Seksyen 86 Kanun Keseksaan dengan sewajarnya di mana Perayu sepatutnya dibebaskan dan dilepaskan, merujuk kepada Seksyen 84 Kanun Keseksaan. Oleh yang demikian, pihak pembelaan telah diletakkan dalam keadaan lemah, malu dan prasangka.

(b) Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dengan tidak meminda pertuduhan di bawah Seksyen 300 keempat (Seksyen 300 (d) yang akan mencetuskan operasi Seksyen 162 Kanun Acara Jenayah, di mana ianya adalah mandatory. Oleh yang demikian kegagalan Yang Arif telah menyebabkan satu pengadilan yang salah.

(c) Secara alternatifnya Hakim Mahkamah Tinggi yang bijaksana telah gagal untuk membuat pertimbangan bahawa kematian dalam kes ini adalah berpunca daripada berlakunya pergaduhan secara tiba-tiba dan oleh yang demikian, Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah gagal untuk mempertimbangkan kecualian 4 Seksyen 300 Kanun Keseksaan.

(d) Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila beliau gagal mempertimbangkan dengan sewajarnya keterangan yang diberikan oleh saksi SP4 tanpa menilai percanggahan dalam keterangannya berbanding dengan keterangan saksi-saksi pendakwaan yang lain.

(e) Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila beliau mempertimbangkan dengan sewajarnya dengan tidak menilai kes pendakwaan bahawa terdapat pecahan (break in the chain of evidence) di dalam rantai keterangan yang telah dikemukakan oleh pihak pendakwaan.

(f) Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila beliau telah menyatakan bahawa SD4 telah dipanggil sebagai saksi pakar untuk memberi keterangan kepada keadaan perayu semasa kejadian itu berlaku.

(g) Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila beliau setelah menyatakan bahawa SD4 telah dipanggil oleh pihak pembelaan untuk memberikan keterangan bagi

pihak perayu, oleh yang demikian, beliau adalah seorang saksi yang bukan bebas, telah menolak keterangan SD4, dalam berbuat demikian Hakim Yang Bijaksana telah gagal membuat penilaian yang sewajarnya ke atas keterangan SD4 dan telah gagal memberikan pertimbangan yang sepatutnya terhadap keterangan tersebut.

(h) Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dan segi undang-undang dan fakta apabila beliau gagal mempertimbangkan dan menolak bukti dan keterangan yang diberikan oleh SD4 yang nyata tidak bercanggah atau dicabar semasa soal balas. Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan fakta apabila tidak menilai terlebih dahulu keterangan yang telah dikemukakan oleh perayu berkenaan dengan Neuroglycopenia dan kegagalan oleh pihak pendakwa untuk mencabar keterangan saksi SD4.

(i) Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila beliau telah menerima secara keseluruhannya bukti dan keterangan yang kemukakan melalui SP11 tanpa terlebih dahulu menilai bukti dan keterangan yang telah dicabar dan bercanggah semasa soal balas.

(j) Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta dalam membuat kesimpulan keseluruhan kes terhadap beban bukti kes di hadapan Yang Arif Hakim. Hakim Mahkamah Tinggi telah terkhilaf apabila tidak menilai terlebih dahulu bahawa keterangan SW4, beliau telah bertemujanji dan memeriksa perayu dan sebelum membuat keputusan berbanding dengan SP11 yang tidak berbuat demikian.

BRIEF FACTS

[4] The appellant was charged for murder and sentence to death. The charge reads as follows:

> Bahawa kamu pada 12.08.2010, jam lebih kurang 8.30 pagi, bertempat di hadapan rumah No. 13, Jalan Sekolah, Pelabuhan Klang, di dalam Daerah Klang, di dalam Negeri Selangor Darul Ehsan, *dengan niat telah melakukan kesalahan bunuh* hingga menyebabkan kematian dengan menetak leher Teo Chai Hock, No. KPT 400918-10-5213 menggunakan sebilah parang dan adalah dengan ini kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan. (Emphasis added.)

[5] The learned trial judge Justice Nor Azian Shaari had written an articulate judgment dealing with the issue of automatism admirably and we have taken the liberty to repeat the relevant part of the judgment in extenso.

[6] The issues relating to the charge of murder can be summarised as follows:

(a) SP4 and SP8 were the main witnesses who saw the appellant attacking the victim with a *parang*; and

(b) SP4 saw the incident from the house and SP8 outside the house.

[7] The appellant says there were contradictions in the evidence of SP4 and SP8. We have perused the record and do not find merit in the argument as one narrated as was seen from the house and the other outside the house. The learned trial judge had dealt with the relevant issues to succeed for a charge of murder. In addition there are overwhelming evidence that it was the appellant who attacked the victim, and the victim died as a result of the attack and deceased was identified by all concerned, sufficient to attract the charge of murder, (see *Cheong Kam Kuen v Public Prosecutor* [2013] 1 MLJ 15; [2012] 8 CLJ 537 (FC)).

[8] It is trite that the appellate court will not interfere with the finding of facts of the trial judge more so when there are sufficient evidence to convict the accused as charged.

[9] The learned trial judge had captured the salient facts to sustain a charge for murder when she wrote as follows:

> On 12 August 2010 at about 8.30am SP4 was in the hall of her house watching television with her mother in-law and son. SP4 saw her father in-law, Teo Chai Hock ('the deceased') return home from jogging. The deceased parked his motorcycle outside the house as he usually did as he would leave the house at 6am to jog and return home around 9am.
>
> However before the deceased could open the gate, SP4 saw the accused coming from the direction of the house next door carrying a *parang* and going towards the deceased. The accused was known as 'Uncle' and a neighbor since 1992. Suddenly the accused approached the deceased and swung the *parang* and hit the deceased. SP4 saw the deceased raised his hand to cover his face.
>
> The incident was witnessed by SP8 who was then carrying out her duty as a security officer at the nearby school. SP8 also had witnessed the argument between the accused and the deceased. According to SP8, the accused approached the deceased first and started quarelling loudly in Chinese.
>
> Both SP4 and SP8 saw the Accused slashed the deceased at the head while the accused moved to the centre of the road chased by the accused.
>
> SP4 took the key to the grill door of the house and screamed in Chinese to the accuded 'Uncle jangan menetak, nanti dia akan mati'. However the appeal was ignored by the accused who instead said 'Saya nak dia mati dan saya nak tikam kepala sampai patah!'.
>
> SP4 saw clearly the accused slashed three times at the neck of the deceased after which the deceased fell on the road. The accused then went into his house compound, washed his hands and rode his motorcycle and left the scene.
>
> The accused then went to the Port Klang Police Station whereby on his information to SP1, SP1 directed police personnel to go to the scene ie at 13, Jalan Sekolah, Port Kelang. SP1 also lodged a report ie Port Kelang Report 005043/10 (P5).

A The post-mortem conducted on the deceased certified that the deceased died as a result of the injury to the neck.

[10] The learned trial judge went on to say that the prosecution relied on limb 4 ie s 300(d) of the Penal Code, whereas it is the contention of learned counsel for the appellant that the appellant was charged under s 300(a) and failure to amend the charge deprived the appellant valid defences under the law. That part of the judgment which the appellant complaints of read as follows:

C The prosecution was relying on limb 4 ie s 300(d) of the Penal Code. As such, the prosecution needs only to prove that the accused knew that the act would cause bodily injury and is likely to cause death as such act was with the intention to caused death.

D Section 300 of the Penal Code states:

300 Murder

Except in the cases hereinafter excepted, culpable homicide is murder —

E (a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

F (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[11] It was not in dispute the charge uses the word 'dengan niat telah H melakukan kesalahan bunuh'. Basically it means that 'with intention to kill' and does not mean that the appellant was charged under s 300(a) of the Penal Code or as the learned judge puts it that the prosecution relied on s 300(d). Our reasons are as follows:

I (a) s 299 deals with culpable homicide ie causing death unlawfully. To be liable for murder one of the ingredients stated in s 300(a)–(d) must be satisfied. We have dealt with ss 299–300 in some detail in *Public Prosecutor v Thenegaran a/l Murugan* [2013] 3 MLJ 328. We do not wish to repeat the same save to quote a few paragraphs which reads as follows:

Basically s 299 deals with unlawful killing. For the killing to warrant the death penalty one of the criteria set out in s 300 must be satisfied for the accused to be punished under s 302 of the Penal Code which reads as follows:

> Whoever commits murder shall be punished with death.

However, if the prosecution cannot satisfy one of the provisos to s 300 but it is an unlawful killing as set out in s 299 and the defence has placed a credible defence of aggravating and/or mitigating factors as opposed to denial or alibi, than the punishment will have to be lesser than that of death penalty and in almost all cases of serious nature the punishment will have to be under s 304 of the Penal Code or for lesser conduct or factor it may attract milder sentencing provision under the Penal Code.

(b) it is wrong to say that the accused was charged under s 300(a) or (b) or (c) or (d). The only charge to attract s 302 is a charge for murder and for that the prosecution has to prove one of the elements in s 300. Technically there cannot be a charge on any of the limbs of s 300. The charge must only be for murder;

(c) s 300(a)–(d) only explains how intention can manifest for the *presumption of culpable mental state to operate* to satisfy the element of mens rea to sustain a charge of murder. (Emphasis added.);

(d) in essence s 300(a)–(d) deals 'with intention to kill', which is reflected in the charge itself. It is well established that before deciding whether a case of culpable homicide amounts to murder there must be proof of intention to kill which is an elementary principle of criminal law and reflected in every limb of s 300; and

(e) it is totally erroneous for learned counsel to argue that the appellant was charged under s 300(a) based on the phrase 'with intent to kill' when s 300(a) says 'if the act by which the death is caused is done with the intention of causing death'.

[12] In our considered view learned counsel for the appellant's submission on s 300 of the Penal Code is misconceived and has no merits.

[13] We do not see how the exception to murder as advocated in Exception 4 of the Penal Code will apply here when there is clear evidence to attract a charge of murder. There are five exceptions to culpable homicide amounting to murder and is set out clearly in the Illustrations of s 300 of the Penal Code. We have dealt with it in great detail in the case of *Rozmi bin Yusof v Public Prosecutor* [2013] MLJU 366. We do not wish to repeat the same save Exception 4 which the appellant is relying on reads as follows:

A

> Exception 4—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

B

[14] We have perused the appeal record in detail and we find no evidence to attract Exception 4 in the Illustrations of s 300. In this respect we are of the considered view the submission of learned counsel for the appellant is misconceived.

C

[15] The appellant's complaint that the defence of automatism or attack of hypoglycemia or neuroglycopenia was not appropriately considered has also no merit. The learned trial judge had taken great pains to assess this issue and is reflected from pp 242–254 and it is the finding of the learned trial judge that the defence of unawareness or automatism by reason of hypoglycemia must fail. That part of the judgment, inter alia, reads as follows:

D

> As suggested or advanced by the defence in the prosecution's case the defence story was that:
>
> E
>
> (1) The deceased had allowed his gate to knock on the cement of the accused's house and this caused damage to the accused premises and also disturbed the accused and his wife;
>
> (2) The accused is diabetic;
>
> F
>
> (3) On the day in question the accused had taken his medication but was late in having his meal;
>
> (4) The accused was gardening;
>
> (5) The deceased approached the accused and uttered indescent words to the accused and hit the accused on the head. This caused the accused to react
>
> G
>
> in anger.
>
> (6) The accused was not aware when he slashed the deceased.
>
> In short, the defence is that when the accused committed the act he was in a state of hypoglycemia and therefore unaware of what he was doing. The defence called SD4,
>
> H
>
> a consultant psychiatric to give evidence of the accused medical condition. In rebuttal, the prosecution called SP11 (Dr Nor Azmi bin Kamaruddin, a Medical and Endocrinology Consultant attached to the University Kebangsaan Malaysia).
>
> The evidence of the defence is as follows:
>
> I
>
> (1) The accused is diabetic since ten years prior to the date of the incidence and obtained his medication from 'Klinik Dr Peters' (the clinic of SD2);
>
> (2) The accused admitted that he was not on good terms with the neighbours (the deceased's family), reason being the issue of the gate.
>
> (3) On the day in question, after the accused got up from sleep, he had taken

his diabetic medication (said to be 'Amaryl') and went on to sweep the front of his house. He also said he did gardening on the side of his house.

(4) The accused said he saw the deceased riding his motor cycle passed the place where the accused was gardening. The deceased uttered words in Hokkien which the accused said was to the effect of 'emak saya ditiduri oleh oleh lain dan lahirkan anak seperti saya';

(5) The accused claimed that the deceased approached him and hit him on the back of his head causing him to nearly fall;

(6) The accused then claimed that after being hit by the deceased he went blank and did not know what happened then;

(7) The accused claimed that he was given a drink (prune juice) by SD6. After a while he washed his hands and went to the police station as he felt he had killed someone (said in re-examination).

On a close scrutiny of the defence the following would show or indicated the evidence has very many gaps and unanswered questions:

(1) If the deceased was the one who started by verbally abusing the accused why would the deceased be the one to hit the accused on the head;

(2) The accused said he was given prune juice and then he washed his hand and left on a motorcycle whilst SP6 (the accused wife) said she slapped the accused on his cheek, asked him to wash his hand, gave him prune juice before the accused left on a motorcycle; and

(3) The accused stated he went to the police station after the incident because he felt he had killed someone but at the same time said he was not aware of what happened to him after was hit on the head by the deceased.

Therefore there are contradictions in the evidence for the defence. However it also has to be examined whether the defence of unawareness or automatism due to the attack of hypoglycemia can succeed in this case.

The accused called an expert to testify as to his condition when the incident happened ie Dr M Mahadevan (SP4) and in rebuttal the prosecution called Dr Nor Azmi bin Kamaruddin (SP11).

SD4 is a consultant psychiatrist attached to Ipoh Specialist Centre as Madhuban Clinical Director and senior consultant physician psychiatrist.

The relevant evidence of SD4's is reproduced below. The evidence is part of a prepared questions and answers:

Q: Taking into account history of Mr. Hoo Ah Tee and the interview that you had with him and the family is there a possibility that on the 12th August 2010 he had suffered neuroglycopenia?

A: It cannot be rules out that he did not suffer the neuroglycopenia that day, but from the fact that he took his diabetic medication, his behavior was out of character of a 65 years old man, he had been doing some vigorous gardening, there was a genuine amnesia for a preceding and immediately after the event. He had thus satisfied five out of the seven criteria as stated

A

by Professor Vincent Marks in his above mentioned paper. Therefore in all probability he had suffered neuroglycopenia at the time of the incident and was not aware of what he had done during this period of temporary brain malfunction. This fact was also recognized in an article by Frier BM from the Royal Infirmary Edinburgh, published in the International Journal of Clinical Practice 2001 Sep; (123):30-7 (&h Article in index at page 79). Quote 'The human brain is almost totally dependant on a continuous supply of glucose, deprivation of which rapidly causes malfunction'.

B

Q: Would you say a person suffering hypoglycaemic was aware and in control of what he was doing?

C

A: In this medical state he certainly would not be aware of what he was doing and consequently incapable of formulating any intent.

Q: From your observation and interview of Mr. Hoo Ah Tee was he aware and in control of what he was doing on the morning of the 12th August 2010?

D

A: Taking into account his medical condition, his character there was no way whatever he was aware and in control of what he was doing on the morning on the 12th August 2010. He had no intention whatsoever to assault let alone take someone's life that morning. He was not suffering from any disease of the mind but due to a cerebral metabolic insufficiency/cerebral metabolic ancephalopathy.

E

SD4 in no uncertain terms stated that the accused 'was no way whatever he was aware and in control of what he was doing on the morning on the 12th August 2010'.

F

However, the expert called by the prosecution in rebuttal was Dr Nor Azmi Kamaruddin (SP11), an Endocrinologist attached to the Department of Medicine, UKM Medical Centre, Malaysia. Amongst his post-graduates qualification is Masters of Medicine (Internal Medicine and Clinical Trainees in Endocrinology).

The pertinent part of the evidence of SP11 in relation to the accused medical condition is as follows:

G

(1) SD2, the doctor attending to the accused said that the accused did not have any record of having hypoglycaemic attach prior to this incident;

(2) A person attacked by hypoglycemia would have the symptom described below:

H

> Hypoglycemia can lead to the three conditions ie automatism, global and neuroglycopenia. However, prior to the developing any of that there were warning signs and symptoms. Prior to the developing to any of the one above, the blood sugar in one's body needs to come down and the body started to feel weak. Prior to that, the subject feels hungry and if not corrected he started to feels weak. Hunger and feel weak then the automatic nervous system will start to come in and then symptom like increase sweatiness palpitation tremors and if this is not corrected, lost of consciousness and if it is left untreated it will caused death. The first symptom, feeling hunger as the blood sugar level is down. If not

I

corrected, you start to feel weak, generalised weakness (as though you have no energy). You can't move or stay put. If it is left untreated, the body produce other warning sign; the heartbeat very fast, started to sweat, started to tremble and become very pale and slowly into unconscious state. During the state of unconsciousness, it may shake the limb legs and if not treated subject to succumbed to death;

(3) Generally when somebody experience hypoglycemia, not only blood sugar low in the brain but also low somewhere in other body for example muscle, less fuel to the muscle. Thus to perform an act that require strength, repeatatively is impossible.

Now, when there are two experts the courts would have to decide whose evidence the court would accept. In this case, it is not disputed SD4 is a well known. He is a renowned psychiatrist, if I may say not only in Malaysia but internationally. I would venture to state that. However his field is psychiatry.

On the other hand, SD11, his curricular vitae (P56) evidences that he is an endocrinologist, the right field for diabetes and hypoglycemia. Further, SD4 was called by the defence to give evidence for the accused. Surely this would mean he is a non independent witness whilst in comparison SP11 is an employee of the UKM and would have no interest whatsoever in this case.

Therefore the court has no choice but to accept SP11 as the right/ appropriate independent expert. From the evidence it is very clear that:

(1) For an attack of hypoglycemia, there would be symptoms/warning signs like hunger and weakness in the case of the accused there was no such symptoms.

(2) A person in a hypoglycemia state would not be able to perform 'an act that required strength, repeatatively is impossible'. In this case the accused slashed the deceased at three places, acts which a person under such an attack could not have done.

(3) A person under such an attack would not revert to his normal condition just with a prune juice as stated by SP11 - 'the prune juice and 100 plus can reverse the hypoglycemia but it is usually transcient. If the whole event takes more up to 1 hour or more, the hypoglycemia tends to recur and develop the symptom and signs. A mere prune juice diluted by 100 plus may not be able to sustain somebody blood sugar for a long period especially for a person who got Amaryl on the system'. However the accused said he was alright after being slapped by his wife, given prune juice and then was able to ride his motorcycle to the police station and relate what have happened.

From what was said by SP11, it is clear, if the accused was in a state of an attack of hypoglycemia, he would not have had the strength to slash the deceased as he did and he would not have 'recovered' so soon as to realise his act and ride the motorcycle to the police station.

Having considered the evidence of SD4 and SP11 it is not probable that the accused was unaware of his act that caused death of the deceased. The accused was in fact as what was stated by Richard Malanjum (FCJ as he then was) in *Kenneth Fook Mun Lee v Public Prosecutor* at p 155 repeating the words of the Court of Appeal:

> '… that the weight of evidence clearly established that the respondent was very much in control of his action …'. Therefore the defence of unawareness or automatism by reason of hypoglycemia must fail.

[16] We have gone through the expert evidence in detail. We do not see any reason to disturb the finding of the learned trial judge on the issue of automatism. In addition we must say that there is no duty or obligation under the Evidence Act 1950 ('EA 1950') for the judge to be bound by or accept expert evidence though we agree that there are cases in some technical matters like intellectual property where it is stated that court must act on expert evidence. Under s 45 of the EA 1950 expert evidence are only to be treated as relevant facts for purpose of admissibility and consideration. Like all relevant facts the court has to make a finding. If not for s 45, expert evidence cannot be introduced in civil or criminal cases as it will attract the jurisprudence relating to irrelevant and inadmissible evidence. Section 45 of the EA 1950 states:

> 45(1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.
>
> (2) Such persons are called experts.

[17] Automatism at common law may negate culpability. A few paragraphs from learned authors of Smith and Hogan on *Criminal Law* (5th Ed), pp 38–39 will be instructive. The said paragraphs read as follows:

> Automatism arising from psychomotor epilepsy in insanity. On the other hand, acts done while sleeping, sleepwalking, in a hypoglycaemic episode or under concussion have been regarded as non-insane automatism. In Quick Lawton LJ said of 'disease of the mind':
>
> > … the fundamental concept is a malfunctioning of the mind caused by disease. A malfunctioning of the mind of transitory effect caused by the application to the body of some external factor such as violence, drugs, including anesthetics, alcohol and hypnotic influences cannot fairly be said to be due to disease.
>
> In that case the condition of D, a diabetic, was due to excess of insulin in the bloodstream. The taking of the insulin was 'an external factor', so he was not suffering from a disease of the mind. It would apparently have been otherwise if his condition had arisen, not from the insulin, but from his diabetes.

Where the incapacity alleged by D is, in law, non-insane automatism, he bears only an evidential burden. He must lay a proper foundation for the defence by introducing evidence from which it may reasonably be inferred that the act was involuntary. Whether such a foundation has been laid is a question of law. Lord Denning has said that the accused's own word will rarely be sufficient, unless it is supported by medical evidence. Once a proper foundation has been laid, the jury must be directed not to convict unless satisfied beyond reasonable doubt that the act was voluntary. The difficult questions which arise where there is evidence that the automatism was caused partly by disease of the mind and partly by other factors are considered below.

Automatism has narrow limits as a defence. It is to be confined, according to Lord Denning, to acts done while unconscious and to spasms, reflex actions and convulsions. The common law never recognised 'irresistible impulse' as a defence even where it arose from insanity. A fortiori, it would not be recognised in the case of a sane person. The fact that, as a result of hysterical amnesia or hysterical figure, D was unaware of 'legal restrictions or moral concern', is no defence if he knew the facts which constitute the offence charged. (Emphasis added.)

[18] Having quoted that we must say that Penal Code or other relevant Act does not specifically provide for the defence of automatism or state its element, applicability or burden of proof. There are handful of cases in Malaysia which had dealt with the issue of automatism. Section 84 of the Penal Code itself does not deal with the jurisprudence relating to automatism. Where the defence is one of unsound mind the defence is one of insanity and the onus of proof is on the accused. The Court of Appeal in *Abdul Razak bin Dalek v Pendakwa Raya* [2010] 3 AMR 610 as to the issue of automatism had this to say:

Automatism refers to a state of defective consciousness in which a person performs unwilled acts. It may be caused by concussion, sleep disorders, acute stress, epilepsy and other elements like hypoglycaemia. The House of Lords has held that there is in law two types of automatism, namely, insane and non-insane automatism. Insane automatism is where the primary cause of the abnormality is internal to the accused and prone to recur. The condition will be classified as a disease of the mind. It will then fall within the McNaghten Rules. Non-insane automatism occurs where the abnormality is caused by a factor external to the accused like, for example, a blow to the head, medication, alcohol or drug. The distinction is important as it will determine the onus of proof. Where the condition is a disease of the mind, it will fall within the McNaghten Rules which is reflected in s 84 of the Penal Code. This section, read with s 105 of the Evidence Act 1950, will place the onus on the accused to establish the defence. If the condition does not produce a disease of the mind, such as in the instant appeal the onus will be upon the prosecution to exclude the alleged incapacity (see *Public Prosecutor v Kenneth Fook Mun Lee (No 1)* [2001] 8 CLJ 544; [2002] 2 MLJ 563, *Bratty v Attorney General for Northern Ireland* (1981) 46 Cr Appeal Report I, *R v Hennessy* [1989] 2 All ER 9, *R v Quick* [1973] QB 910, *R v Barry Douglas Burgess* (1991) 93 CrApp R 41, *Police v Bannin* [1991] 2 NZLR 237). Automatism had also been defined to mean an act which is done by the muscles without any control by the mind such as a spasm, a reflect action or a

convulsion, or whilst sleep walking (see *Bratty v Attorney General for Northern Ireland* (1961) 46 Cr App RI, per Lord Denning at p 16). Automatism was also explained simply 'as an action without any knowledge of acting, or without any consciousness of what is being done (see the judgment of the Court of Appeal in New Zealand in *Cottle* [1958] NZLR 999 at p 1020). In *Police v Bannin*, Fisher J said:

> The question is whether the accused has retained sufficient mental capacity to reach the threshold required for the particular crime with which he is charged. That threshold will vary from one type of crime to another. It will be affected by the reasons for which a particular class of conduct was proscribed by the law, the implied statutory intention as to the level at which citizens should be held responsible for their conduct, and the way in which the law has defined the crime. *In short, the focus should lie upon the elements of the charge.* (Emphasis added.)

[19] Section 84 of the Penal Code has everything to do with legal insanity and not medical insanity. Despite a number of cases in Malaysia where defence of automatism was placed and adumbrated by the courts we are of the considered view that automatism per se is not an absolute defence to murder within our jurisprudence save that it may assist to mitigate punishment if the defence is well nurtured. Learned author Raghavan on *Law of Crimes*, (3rd Ed) at p 142 had this to say:

> There is a distinction between medical and legal insanity and the courts are concerned only with legal insanity. If the facts show that the accused know that he had done something wrong he will not be exempted under this section.
>
> Thus it is clear that in order to claim exemption from criminal liability, the person must be incapable of knowing (1) the nature of the physical act, (2) of his physical act is illegal - contrary to law, and (3) that the act is wrong one.
>
> The doctrine of irresistible impulse has not been accepted as a ground of exemption both in England and in India. *However courts have taken this as a ground for mitigation of punishment.* (Emphasis added.)
>
> Epileptical insanity may fall under this section if it is established that he was suffering from it at the time of commission of the crime, similarly somnambulism.

The law on s 84 is well settled in India (see *Surendra Mishra v State of Jharkhand* (2011) 11 SCL 459).

[20] In the instant case we find it difficult even to fathom how automatism of any kind will be applicable either to obtain an acquittal or reduction of charge and in consequence there cannot in law be grounds for mitigation of punishment. We have read the 103 page submission filed by the appellant and contrasted with the evidence and law. We find no merits.

[21] After having gone through the evidence and the amended petition in

detail (notwithstanding learned counsel did not submit on all of the grounds), we are of the considered view the appeal has no merits.

[22] It is well settled that it is in the hands of triers of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction as well as sentence. We have perused the evidence in detail and we are satisfied that there are sufficient material to support a charge for murder and the view taken by the trial court on the relevant issues in our view was a reasonable view of the evidence on record, and the court had followed Radhi's direction and rightly applied the maximum evaluation and beyond reasonable test, (see *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281; *Tong Kam Yew & Anor v Public Prosecutor* [2013] MLJU 243; (Criminal Appeal No B-05–63 of 2011 (20 March 2013)); *Chin Kek Shen v Public Prosecutor* Criminal Appeal No B-05–83/03 of 2012 (5 April 2013)].

[23] In consequence it is a safe decision and appellate intervention is not necessary. Appeal is dismissed. The conviction and sentence by the High Court is affirmed.

[24] We hereby order so.

Appeal dismissed.

Reported by Afiq Mohamad Noor